Supreme Court, U.S.
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92-367
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

ALFREDO HIERREZUELO,
VICTOR CABRERA,
LUIS M. JUSTIZ,
MARCOS CESAR-NUNEZ,
ANDRES VASQUEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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48 pp

QUESTION PRESENTED FOR REVIEW

WHETHER DUE PROCESS OF LAW REQUIRES MORE THAN A SUPERFICIAL VOIR DIRE OF JURORS EN MASSE WHERE THE JURY HAS IMPROPERLY HEARD PREJUDICIAL EVIDENCE PREVIOUSLY EXCLUDED BY THE COURT?

PARTIES TO THE PROCEEDINGS BELOW

1. Petitioners, ALFREDO HIERREZUELO, VICTOR CABRERA, LUIS M. JUSTIZ, MARCOS CESAR-NUNEZ, ANDRES VASQUEZ

2. UNITED STATES OF AMERICA, by the United States Attorney for the Southern District of Florida.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1) and Rule 10, Supreme Court Rules.

The decision below of the United States Court of Appeals, Eleventh Circuit, rendered on March 26, 1992 (App. A), decided an important question of federal law which has not been, but should be, settled by this Court. Further, the decision below conflicts with principles previously set forth in decisions of this Court.

Circuit Courts, as well as this Court, have recognized that in some cases general curative instructions and

perfunctory voir dire on the jurors' ability to follow those instructions may be insufficient to prevent undue prejudice from the jury's exposure to improper evidence or influences. However, these decisions have been reached on a case-by-case basis, without providing the District Courts with either the factors to be considered or alternative intermediate methods to use to prevent prejudice in these cases, short of declaring a mistrial. As a result of the absence of any clear direction in this matter, trial courts have been left with the options of using the traditional curative methods of generalized limiting instructions and voir dire en masse or, when these methods appear to be insufficient, declaring a

mistrial.

Petitioners urge this Court to grant certiorari in this case in order to provide the District Courts with clear direction on when the intermediate procedure of more intensive individual voir dire can and should be used to prevent undue prejudice and at the same time address the interests of judicial economy and avoidance of the cost and disruption of a new trial.

The decisions sought to be reviewed are the convictions of the Petitioners, the denial of the Petitioners' Motion for Mistrial, the Denial of the Petitioners' Motion for New Trial and the decision of the Eleventh Circuit affirming these District Court decisions.

The constitutional provision

involved in this case is the Due Process clause of the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to give be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

> without just compensation. U.S. Const. Amend. V.

The decision of the Eleventh Circuit below conflicts with the principles set forth in the following decisions of this Court:

Throckmorton v. Holt, 180 U.S. 552, 567, 21 S.Ct. 474, 480, 45 L.Ed. 663 (1901)

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 558, 104 S.Ct. 845, 851, 78 L.Ed.2d 663, ___ (1984) (J. Brennan, concurring) (citation ommitted).

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

The Petitioners, Appellants/Defendants below, Alfredo Hierrezuelo, Victor Cabrera, Luis M. Justiz, Marcos Cesar Nunez and Andres Vasquez, will be referred to collectively as "the Petitioners." The Respondent, Appellee/Plaintiff below, the United States of America, will be referred to as "the Government."

References to the record on appeal in the Eleventh Circuit proceedings will be designated "R," followed by the appropriate volume and page number. Documents contained in the attached Appendix are identified as "App.," followed by an alphabetical designation

and page number, where appropriate.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On June 25, 1989, the Petitioners were picked up in the area of Anguilla Cay, Bahamas as a result of a United States Coast Guard investigation conducted in Bahamian waters on June 24-25, 1989. The Petitioners were delivered into the custody of the Royal Bahamian Defense Force. (R11:217;R12:502-503) The Bahamian Government did not prosecute the Petitioners. (R11:226;R12:503) The Petitioners were released from Bahamian custody into the custody of the United States and were then transported to Miami, Florida, where they were released from United States custody without being charged. (R13:539,560-561)

Over a year later, The Government contacted the Petitioners and requested that they come in for questioning. The Petitioners voluntarily complied with the request, and on August 8, 1990, they were indicted for possession with intent to distribute cocaine, and conspiracy to possess with intent to distribute cocaine, in violation of 46 U.S.C. Sections 1903(a)(g) and 1903(j)(g) and 18 U.S.C. Section 2. (R1:1;R13:560-561,573)

Jury trial was held before the Honorable Lenore C. Nesbitt, District Court Judge from December 17, 1990 to December 20, 1990, in the case of United States v. Hierrezuelo, et al., Case No.: 90-518-CR-NESBITT (S.D. Fla.). Prior to trial, the District Court ruled that evidence that an air drop of narcotics

had occurred in the area where the Petitioners were sighted would be inadmissable at trial on the grounds that such evidence constituted hearsay and was highly prejudicial to the defense. (R10:7-8)

At trial, Government witness Mark Deacon, a Coast Guard pilot, testified that he "knew" that the airplane that he was following was smuggling contraband. (R.10:26) The Petitioners objected. (R10:26)[1] The District Court instructed the jury to disregard the testimony, then questioned each juror, in open court and in the presence of the other jurors, as to whether they could follow the Court's

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[1] Each Petitioner was deemed to have adopted the objections and Motions raised by all other Petitioners. (R2:111;R13:591)

instruction to disregard the testimony. All jurors responded that they could. (R10:26-29) The defense argued that due to the highly prejudicial nature of the testimony, the jurors could not be expected to disregard the statement and moved for a mistrial. Their Motion was denied. (R10:28-29)

The jury returned a verdict of guilty as to each Petitioner on both Counts. (R2:96-100) On December 28, 1990 the Petitioners filed their Motion for New Trial arguing, inter alia, that it was error to deny their Motion for Mistrial. (R2:102) The Motion for New Trial was denied. (R2:111)

Petitioners timely filed an appeal before the Eleventh Circuit Court of Appeals, challenging, inter alia, their

convictions and the denials of their Motion for Mistrial and their Motion for New Trial. United States v. Hierrezuelo, et al., Case No.: 91-5225 (11th Cir.). The Eleventh Circuit affirmed in United States v. Hierrezuelo, 959 F.2d 971 (11th Cir. 1992)(unpublished opinion). (App. A) The Petitioners' Petition for Rehearing was denied on May 4, 1992. (App. B)

C. STATEMENT OF FACTS

The jury was instructed that in order to convict the Petitioners, they had to find that they had actual possession of cocaine on the vessels in which they were traveling. (R13:575-577) The Government was not permitted to argue constructive possession and the jury was not instructed on this theory. (R13:577-

589)

On appeal, the Eleventh Circuit found that the evidence properly introduced at trial was sufficient to support the Petitioners' convictions. (App. A) However, there was no direct evidence to support a finding that the cocaine had ever been on either boat. Tests for cocaine residue on the boats were negative (R11:276-277), three burlap fibers found on one of the boats did not match the wrappings of the bales (R13:607), and none of the Government witnesses had any personal knowledge of the bales having ever been aboard either boat. (R10:19;R11:145; R12:392-393,483,501-502)

During trial, Coast Guard and Customs personnel testified that they

were in the area as part of an investigation of a suspected narcotics air drop. The Petitioners' objected to this testimony each time it was introduced, and the jury was repeatedly instructed that they were not to consider this as evidence that an air drop had in fact occurred, but simply as an explanation as to why Government agents were in the area in the first place. (R10:8-9,25;R11:118,155-156). Government witnesses admitted that the reports were tentative and that they had no idea whether an air drop had even occurred. (R11:200-201;R12:393-394) For all they knew, the bales in the cave could have been off-loaded from another vessel. (R11:200-201) If that was the case, the jury could not have convicted, since the

jury instructions precluded a finding of constructive possession and required a finding of actual possession aboard the Petitioners' vessels. (R13:575-589)

But when Coast Guard pilot Mark Deacon testified that he "knew" that the plane he was tracking was smuggling narcotics, the trial court did not repeat the same limiting instruction. Instead, the following proceedings resulted:

> WITNESS: ...So what I did was I climbed above 10,000 feet to make sure I wouldn't collide with the aircraft, because I knew since it was smuggling some kind of contraband --
>
> MR. WHITTICE [Defense Counsel]: Objection.
>
> MR. RUBINO [Defense Counsel]: Objection.
>
> MR. FERNANDEZ [Defense

Counsel]: Objection.

WITNESS: That it was --

THE COURT: Just stop, stop, stop, stop.

Now members of the jury, disregard what this witness says. What he believed, what he thought is entirely irrelevant to this case. You are only concerned with the facts, not what witnesses think, believe, anticipate, expect, anything of that nature.

Now can all of you disregard that statement made by the witness in your deliberations?

You are to decide this case based upon facts, what is known, what is seen, what was heard, not what people believe.

Can you follow that

court's instruction and disregard that statement, sir?

A JUROR: Yes.

THE COURT: Can you?

A JUROR: Yes, Ma'am.

A JUROR: Yes.

THE COURT: Can you, ma'am?

A JUROR: Yes.

THE COURT: Can you, sir? Can you disregard that statement?

A JUROR: Yes.

THE COURT: And you?

A JUROR: Yes.

THE COURT: And you, sir?

A JUROR: Yes.

THE COURT: Can you?

A JUROR: Yes.

THE COURT: And you, ma'am?

A JUROR: Yes.

THE COURT? And you?

A JUROR: Yes.

THE COURT: Can you?

A JUROR: Yes.

A JUROR: Yes.

THE COURT: Can you?

A JUROR: Yes.

THE COURT: I will see the attorneys sidebar.

(At the bench)

(R10:26-28)(emphasis supplied)[2] Defense counsel argued that the testimony was too

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[2] When Coast Guard pilot James Boutte, Jr. later made a similar statement, the trial court first instructed the jury to ignore the testimony, and then went on to question the witness further about his belief that an air drop had occurred. (R11:118)

prejudicial for the jury to be able to disregard it based upon the Court's instruction. They further argued that the Government had known that such testimony was inadmissable from the beginning of the trial and that the witness had admitted in earlier proceedings that there was no proof that a drop had occurred, yet the Government let the statement get out. (R10:28-29) The Petitioners moved for a mistrial and their Motion was denied. (R10:28-29)

In their Motion for New Trial, Petitioners argued that because the Government's case was weak and was based upon purely circumstantial evidence, this inadmissible testimony was unduly prejudicial. (R2:102) In order to convict, the jury must have disregarded

the trial court's admonitions not to consider the air drop testimony as evidence of guilt, since the Government offered no other factual basis from which the jury could have concluded beyond a reasonable doubt that the bales had ever been aboard the Petitioners' boats.

It is the Petitioners' position that the procedure used by the trial court to attempt to cure the prejudicial effect of this inadmissible testimony was insufficient and resulted in a Due Process violation.

ARGUMENT AND AUTHORITIES

DUE PROCESS OF LAW REQUIRES MORE THAN A SUPERFICIAL VOIR DIRE OF JURORS EN MASSE WHERE THE JURY HAS IMPROPERLY HEARD PREJUDICIAL EVIDENCE PREVIOUSLY EXCLUDED BY THE COURT

The Petitioners had a Due Process right to have their guilt or innocence judged on the basis of only that evidence that was properly before the jury. Where a verdict is influenced by extraneous matters, it cannot be permitted to stand. In this case, the District Court's investigation into the potential for prejudice caused by the improper evidence was insufficient to preserve the Petitioners' Due Process rights.

Under the method of questioning used in this case, a juror who had reservations about his or her ability to disregard the improper evidence would have had to have the courage to admit in open court and in front of his or her fellow jurors that unlike all the other jurors who had answered before, he or she

would be incapable of following the court's instructions and found the instructions confusing in light of the apparently inconsistent instructions that had previously been given.[3]

Had the trial court conducted voir dire individually, outside the presence of other jurors and courtroom spectators

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[3] When four Government witnesses testified about the suspected air drop, the jury was told that they could consider the testimony as background information. (R10:8-9,25;R11:118,155-156). The jurors were told to ignore Pilot Deaton's testimony and were questioned on their ability to disregard it. (R10:26-28) No juror questioned why they were now being told to disregard the evidence in its entirety, only minutes after they had been told to use it for a limited purpose. (R10:8-9,25) Pilot Boutte later gave essentially the same account. The trial court first instructed the jurors to ignore Boutte's testimony, but then questioned Boutte further on whether it was his belief that an air drop had occurred. (R11:118)

and personnel, the less intimidating circumstances would have encouraged, rather than discouraged, individual jurors to express their reservations and/or ask questions about their understanding of the instructions. There would have been no pressure to parrot the same pro forma responses that the other jurors had given. If a juror expressed misgivings, further voir dire or instructions could have followed or the individual juror could have been excused, leaving only those members of the panel who demonstrated their ability to understand and follow the instructions to render the verdict.

Petitioners do not argue that individual voir dire would be necessary in all situations, or even in most cases.

The risk of improper influence in most cases will be slight, and so may be cured by a superficial voir dire conducted in open court. Where the potentially prejudicial effect of the inadmissible evidence is slight (i.e., where it concerns only an ancillary issue, where similar admissible evidence has been or will be introduced, or where other evidence of guilt is substantial) general curative instructions and/or more superficial voir dire will be effective to remove any potential taint.

But here, since the Government's evidence of guilt was weak and no other evidence was introduced on the air drop issue, the greater potential for prejudice required a more careful and thorough investigation. The District

Court's questioning of the jurors en masse and in open court was insufficient in this case to discover whether each individual juror understood the admonishment and would realistically be able to disregard witness Deacon's improper assertion that he had special knowledge of facts not in evidence.

Members of this Court have recognized that the natural instinct is for a juror to deny that he or she is capable of being influenced by improper considerations:

> Because the bias of a juror will rarely be admitted by the juror himself, "partly because the juror may have an interest in concealing his own bias and partly because a juror may be unaware of it,"

> ... it necessarily must be inferred from surrounding facts and circumstances.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 558, 104 S.Ct. 845, 851, 78 L.Ed.2d 663, ___ (1984)(J. Brennan, concurring)(citation omitted). Justice Brennan went on to explain that the test is whether it is more probable than not that bias exists, and that in making this determination, the juror's answer on voir dire is only one factor to be considered. Id. In other cases, the Eleventh Circuit has recognized that a fuller investigation into extrinsic influences is often required. In United States v. Brantley, 733 F.2d 1429, 1440 (11th Cir. 1984), cert. denied, 470 U.S. 1006, 105 S.Ct.

1362, 84 L.Ed.2d 383 (1985), the Eleventh Circuit held that juror denials and admonishments from the bench were insufficient to protect a defendant from the effect of extraneous information disclosed by one juror to the others.

In United States v. Heller, 785 F.2d 1524, 1527 (11th Cir. 1986), the Court found that it was "inconceivable" that the jurors' denials made in response to the trial judge's "superficial" voir dire could have adequately protected the defendant from the damage caused by the jury's exposure to anti-Semitic jokes. The Court concluded that in the Heller case, nothing short of a mistrial could cure the prejudice to the defendant. Id. at 1527-1528.

It is true that the Heller and

Brantley decisions involved allegations of juror misconduct, and that McDonough considered the effect of a juror's pre-existing bias. However, all cases which in which an unacceptable risk of prejudice has been detected should be subjected to the same rule, since the result of the jury's exposure to prejudicial factors is the same regardless of the source of the prejudice -- a Due Process violation.

This Court has long recognized that while properly-worded curative instructions may often be sufficient to prevent the jury's consideration of improper evidence, there are cases where the risk of prejudice is too great and the only adequate means to cure the error

is a mistrial. Throckmorton v. Holt, 180 U.S. 552, 567, 21 S.Ct. 474, 480, 45 L.Ed. 663 (1901); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 558, 104 S.Ct. 845, 851, 78 L.Ed.2d 663, ___ (1984) (J. Brennan, concurring) (citation ommitted).

Petitioners contend that the alternative does not always have to be the extreme remedy of declaring a mistrial. But here, the conflicting instructions left the jurors with no clear direction as to whether they were permitted to use the evidence, were required to use it for only a limited purpose, or were to disregard it in its entirety. In this case, the curative instructions did not "cure" anything, and the further failure to conduct individual

voir dire leads to the conclusion that the jury may have felt free to convict on the basis of improper evidence.

Even where the remaining evidence is deemed to have been sufficient to support a conviction, the jury's consideration of improper evidence will require a new trial where it cannot be concluded beyond a reasonable doubt that the jury's consideration of the inadmissible evidence did not contribute to the verdict. United States v. Tebha, 770 F.2d 1454, 1456 (9th Cir. 1985). In Tebha, an excluded exhibit was the only evidence offered by the Government to support an inference apparently reached by the jury. Id. Because this inference could have influenced the jury's decision to convict, and the other evidence was

"far from overwhelming," the Ninth Circuit ordered a new trial. Id.

Here also, while the Eleventh Circuit may have found that the remaining evidence was legally sufficient (App. A), it was "far from overwhelming." And, as was the case in Tebha, it is probable that the jury here considered the excluded evidence in reaching an inference that led them to convict.

In this case, in order to obtain a conviction in accordance with the jury instructions on the offenses charged, the Government had to convince the jury that the Petitioners had at some time had the bales aboard their vessels prior to the time that they were stopped by the Coast

Guard.[4]

The Government's theory of prosecution was that circumstantial evidence permitted the jurors to make the following inferences: that the Petitioners had collected bales of cocaine that they found floating in Bahamian waters, loaded the bales onto their boats and then transported the bales to a nearby island where the bales were found stacked in a cave after the Petitioners' boats had been stopped in the area.

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[4] As one Government witness, Customs Agent Matthew Fulmer, candidly admitted, the Petitioners were not being charged with merely being near an island where somebody had hidden cocaine. (R11:145) But Petitioners contend that because the jury had not effectively been prevented from considering improper evidence, that was in fact the factual basis for their conviction.

Since there was no direct evidence to support a finding that the cocaine had ever been on either boat, the jury must have concluded that an air drop of the bales had in fact occurred prior the time that the Petitioners were sighted in the area in order to have then gone on to infer that the Petitioners had retrieved the dropped bales from the water onto their boats. No other construction of the evidence would have permitted the jury to conclude that the bales had actually been aboard the boats, an essential element of the offenses for which the Petitioners were convicted.

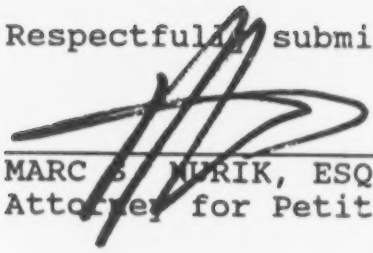
Because the group voir dire procedure used in this case left it uncertain whether the jury could have convicted the Petitioners on the basis of

evidence that had been excluded, the Petitioners' Due Process rights were violated and a new trial is required. However, by granting certiorari in this case, this Court has the opportunity to provide District Courts with a means to prevent this result in future cases.

CONCLUSION

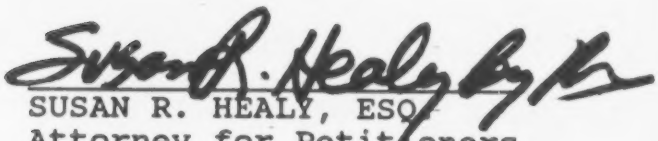
WHEREFORE, Petitioners, Alfredo Hierrezuelo, Victor Cabrera, Luis M. Justiz, Marcos Cesar Nunez and Andres Vasquez, respectfully request that this Honorable Court grant their Petition for Writ of Certiorari and reverse their convictions, grant them a new trial and set forth guidelines for the use of intermediate curative methods to prevent undue prejudice resulting from jurors' exposure to improper evidence.

Respectfully submitted,



MARC S. MURIK, ESQ.
Attorney for Petitioners

and



SUSAN R. HEALY, ESQ.
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to the U.S. Attorney's Office, Southern District of Florida, 155 S. Miami Ave., Miami, FL 33130; and to Kenneth W. Starr, Esq., Solicitor General, Department of Justice, Washington, DC 20530, this 27 day of August, 1992.

MARC S. NURIK, ESQ.
Attorney for Petitioners

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5225
Non-Argument Calendar

D.C. Docket No. 90-518-CR-LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO HIERREZUELO,
VICTOR CABRERA,
LUIS M. JUSTIZ,
MARCOS CESAR-NUNEZ,
ANDRES VASQUEZ,

Defendant-Appellants.

Appeals from the
United States District Court for
the Southern District of Florida

Circuit Judges.

PER CURIAM:

Appellants were convicted of conspiracy to possess cocaine with intent to distribute and possession of cocaine with intent to distribute while on board vessels of the United States, in violation of 46 U.S.C. §1903(a), (g), and (j), and 18 U.S.C. §2. On appeal, appellants contend that there was insufficient evidence to convict them; in the alternative, they contend that they should have received a new trial. Because we find appellants' arguments without merit, we affirm.

Appellants argue that because there was no cocaine found in their boars, there was insufficient evidence to

convict them. However, Coast Guard surveillance revealed that appellants' boats were the only boats in the area. Agents found thirty-three wet bales of cocaine in a dry cave on a remove island; appellants' boats had been seen there earlier. Appellants travelled with their lights off and attempted to flee when intercepted. Although appellants claimed that they had been fishing, there were no fish, fish residue, fishing permits, bait, or tackle boxes, and very little fishing gear found aboard either boat.[1] Chemical lights attached to bales of cocaine discovered in the cave, and to a

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[1]Aboard one boat, agents found a gaff hook, which is a long pole with a hook on the end, and a "Cuban yo-yo," which is a round piece of wood with a line wrapped around it.

bale found floating in the ocean near the island, matched a chemical light found on one of the boats; all of the lights were produced by the same manufacturer from the same lot and glowed with the same intensity. We find this evidence more than sufficient to support appellants' convictions.

Moreover, we find that the district court properly denied appellants' motion for a new trial. The verdict was not contrary to the weight of the evidence. Furthermore, the court did not err in denying appellants' motions for a mistrial.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5225

Filed May 4, 1992

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALFREDO HIERREZUELO,
VICTOR CABRERA,
LUIS M. JUSTIZ,
MARCOS CESAR-NUNEZ,
ANDRES VASQUEZ,

Defendant-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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Before: HATCHETT, ANDERSON and DUBINA, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellants Hierrezuelo, Cabrera, Justiz, Cesar-Nunez and Vasquez is denied.

ENTERED FOR THE COURT:

s/_____
UNITED STATES CIRCUIT JUDGE